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LAW DEPARTMENT.

Conducted By C. W. Thickett, of the Bar.

PROVING THE WITNESSES IN OTHER COUNTIES.—It is a remarkable thing that such radical defects can exist in our law for so many years without any attempt being made to amend them. In nothing is this more exemplified than in the matter of proving wills. There is no provision of law for having the evidence of a subscribing witness, who lives in this State, taken in any way, except before the clerk, who takes the proof of the will and admits it to probate. Thus it may turn out that one of the subscribing witnesses is sick in another county, and cannot go before the clerk of the court where the will is to be proved. There is, so far as we know, no statute to meet such a case, and we do not see how the will could be admitted to probate.

Again, it often happens that one of the witnesses moves to a distant county in the State, so that when the will comes to be proved, the witness may be more than 200 miles away. It is doubtful whether the clerk is obliged to move to subpoena the witness if a witness does not choose to come of his own accord, and it may also be doubted whether it would be lawful to discharge an executor to pay the expenses of such a witness, but however this question may be decided, it is hard to realize that we could be so long without an express provision of the law to meet this case. It could easily be remedied by an enactment allowing the deposition of a witness to a will to be taken or allowing an affidavit of the witness to be made before the clerk of any county in the State, where the witness may reside at the time. There should also be a provision of law especially authorizing the clerk to subpoena witnesses to prove wills. The clerk may have this implied power, but it is doubtful.

IN RE THOMAS—III N. C. 409.—In this case the Supreme Court held that in the probate of a will, it was essential that it should appear that both of the witnesses signed in the presence of the testator, and that if one of the witnesses were dead, it was not enough to prove his hand-writing, but there must also be proved, either by direct evidence or from some other source, that the dead witness had signed the will in the presence of the testator. Under this ruling, both of the witnesses were dead, and there was no other evidence that could be adduced to show that the witnesses signed in the presence of the testator. It would be impossible to prove the will, because as we have said, it would not be sufficient merely to prove the hand-writing of the witnesses, but it is well known that lawyers who draw wills, and persons who execute them, do not overlook the law in this respect, and to take such steps as would be necessary to provide against such contingencies. If after a will is drawn, and during the life time of the testator, one of the witnesses should die, it would be best to procure another witness in his stead.

THE ASSIGNMENT ACT.—THREE DECISIONS OF THE SUPREME COURT.—The celebrated "assignment act" which was not passed by the Legislature of 1885, and yet became a law, has in its various aspects been three times before the Supreme Court. The last decision was in the case of State vs. Brown, which was an indictment against J. W. Brown, the enrolling clerk of the last Legislature, charging him with corruption in connection with the passage of this act. Brown was convicted in the Superior Court of Wake and on appeal to the Supreme Court, it was held in an opinion filed last week, all the judges concurring, that there was not sufficient evidence of corruption. We think there can be no doubt that that court was right. The evidence was published at length when the trial was going on, and while it was clear that there was gross negligence on the part of more than one official, it does not appear that the court do not think there was any satisfactory evidence of fraud on the part of the enrolling clerk.

In the case of Carr vs. Coke, 116 N. C. 223, the majority of our Supreme Court held that it was not competent for the courts to enquire into the question as to whether the act under consideration was fraudulently or erroneously enrolled, and that the court was bound to uphold the act. This decision brought about one of the most startling anomalies in all judicial history, namely, that a bill which was before the Legislature and actually voted down could nevertheless have been a part of the law of the land by virtue of either the negligence or the fraud of certain officials. The four opinions filed in the case were all able ones but that of Mr. Justice Montgomery is particularly so. We regard it as the ablest opinion that has been published at length upon the bench and we confess that his cogent reasoning staggered those of us who recover from the view differing from those expressed by him.

The next time this act before the court was in Farthing vs. Carrington, 116 N. C. 35, where the court held that the act did not apply to conditional sales, mortgages and the like executed in present consideration. This construction of the act is a great relief to the English language, but if "judicial legislation" ever was to be commended, it was in this case. Another objection would have paralyzed the business of the country and everybody was gratified that the court was able to interpret the act itself has caused the business men of the country the greatest inconvenience, and we suppose the next Legislature will lose no time in repealing a law which never was passed. There ought not to be any objection to a law forbidding preferences in assignments by insolvent debtors, but we suppose no one will be found who will advocate a statute which prevents a man from recovering his honest debt, whether the debt be contracted before or at the time the security is given.

JUDGE BOYKIN'S RESIGNATION AS PUBLIC CLERK.—There is a practice that exists among some newspapers of our State that is productive of great harm, and that is the universal and wholesale flattery of the judges. Every judge that goes into some counties of our State, according to the local press, is the ablest jurist that has ever been on the bench in the county, delivers the finest charge to the grand jury, and altogether discharges the duties of his office in the most acceptable manner. All this, of course, utter nonsense, and only serves to fill the heads of the incompetent judges with still greater conceit, and to render them thereby still more inefficient. That we have some judges in our State as able and competent as any to be found anywhere no one will deny, and we suppose there will be found very few who will deny that we have some who, to say the least, do not measure up to the average, and it does no good to have published in the newspapers what is absurdly untrue about these officials. We have some hesitancy therefore in publishing a word of commendation of any judge, but we cannot refrain from saying that the resignation of Judge Boykin is a public calamity. When he was at his best we do not believe that a better judge of the Superior Court ever sat upon the bench in North Carolina. Up to the time he became judge he had engaged in a good deal in politics, and this caused some of the legal pro-

feSSION to be apprehensive that he might not be the best equipped for a judicial career, but that as it may, he devoted himself at once, and most assiduously, to his duties, and there never was a better place for a bright legal mind to acquire law than on the bench. Judge Boykin made the most of these opportunities, and ere long his judicial life disclosed the fact that he was fully competent to meet all the requirements of this high and responsible position.

We heard a prominent lawyer of this city state, in speaking of him, a day or two since, that he had the courage to stand by his opinion whenever he found that he was wrong, and by this it was not meant that he was vacillating. He knew when to be firm and yet when convinced by an argument that any intimation he had made was incorrect, he did not hesitate to say so. There are two elements of judicial character, no matter how convincing the subsequent argument may be. Judge Boykin has struck the happy mean between these extremes.

Still another thing that may be said of this eminent jurist was that he did not find it necessary to "play to the grand stand," by which we mean that he did not feel that he was compelled to be constantly scolding the lawyers, the officers of the court and the bystanders in order to let people know that there was a judge present. We have seen some men on the bench who were evidently conscious of their inability to meet the demands of their high office, and who seem to think that they could make people regard them as great judges by asserting their authority, by saying sharp and cutting things to the lawyers, by rebuking the officers of the court, and by treating the bystanders in jail if better order was not kept. There was none of that characteristic about Judge Boykin, and yet no judge had better order in his court than he. The respect of the lawyers and laymen alike more than he did.

But the judicial trait which of all others commended Judge Boykin to the lawyers as a profession, was that he was a polite and attentive listener. When the case was being argued by the most distinguished lawyer in the State or by a youngster in his maiden effort, he was sure of the closest attention from the judges and the bystanders. AN APPEAL TO THE BENCH.—We do not believe that anything can be said of a judge which will commend him to the people as a lawyer and a patient listener. We know that there is no complaint which the lawyers of this State make against the judges so much as one that they will not pay attention to the argument. This complaint applies to the Supreme Court bench as well as to the Superior Court. The grievance is that the judges will read books and decisions, write letters and talk to each other while the lawyers are trying to argue their cases. There is nothing more discouraging to a lawyer, after he has prepared his argument with a great deal of care, than to find that the judges are all gone, diverted, and that they are not attempting to follow the argument. We appeal to the judges in behalf of the lawyers to see that the enrolling clerk of the last Legislature, charging him with corruption in connection with the passage of this act. Brown was convicted in the Superior Court of Wake and on appeal to the Supreme Court, it was held in an opinion filed last week, all the judges concurring, that there was not sufficient evidence of corruption. We think there can be no doubt that that court was right. The evidence was published at length when the trial was going on, and while it was clear that there was gross negligence on the part of more than one official, it does not appear that the court do not think there was any satisfactory evidence of fraud on the part of the enrolling clerk.

SURGEON'S AUTHORITY.—AN INTERESTING POINT.—The medical profession at this time are very much interested in the recent case of Beatty vs. Cullingworth before a high court in the city of London and the medical and law journals are discussing the case pro and con. The plaintiff was a young woman who requested the defendant, an eminent surgeon, to perform an operation upon her. The operation was for ovariotomy, and she claimed that the surgeon had exceeded his authority in going beyond a single operation, whereas in violation of her instruction he performed the operation of oophorectomy. The surgeon contended that after he began the operation, he found it necessary to go beyond the instruction of the plaintiff. There was some variance in the testimony as to whether the plaintiff had not given him tacit consent that the surgeon might do as he thought best, but the surgeon contended, and the court and the jury found that he was warranted in performing the operation if he found it necessary for her life. Several eminent surgeons were witnesses in the case, and some of them testified that they would not attempt an operation where a patient limited them by instructions as to what should be done. It seems to us who are not of the medical profession that this is carrying the point rather too far, and that a person about to be operated upon by a surgeon, ought to be allowed to say far from the operation shall proceed, it being understood, of course, that the patient takes upon himself every risk incurred by his not permitting the surgeon to follow his own judgment.

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THE DOOMED MAN.

There is a time we know not when. A point we know not where. That marks the destiny of man Or glory or despair.

There is line by us unseen. That crosses every path: The hidden boundary between God's patience and His wrath.

To pass that limit is to die. To die as if by stealth: It does not quench the beaming eye, Or pale the glow of health.

The conscience may be still at ease, The spirit light and gay: That which is pleasing still may pass, And care be thrust away.

But on that forehead God has set Indelibly a mark, Unseen by man; for man as yet Is blind and in the dark.

And yet the doomed man's path below May bloom as Eden bloomed; He will not, does not, will not know Or feel that he is doomed.

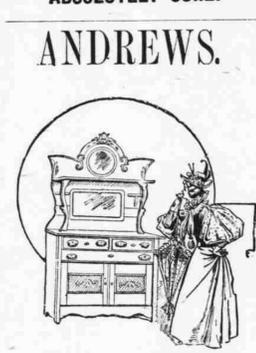
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